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July 22, 2011

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

**Ex Parte Filing**

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Toll Free Service Access Codes*, CC Docket No. 95-155

Dear Ms. Dortch:

I write on behalf of the SMS/800 Management Team to follow up on earlier discussions with the Commission staff regarding a proposed procedural mechanism for the transfer of responsibility for the SMS/800 Functions Tariff from the BOCs to SMS/800, Inc. Enclosed with this letter are two documents related to that proposal. The first document, attached hereto as Exhibit A, discusses the legal basis for the transfer, pursuant to 47 U.S.C. § 214, of tariffing responsibility for SMS/800 service to SMS/800, Inc.

The second document, attached hereto as Exhibit B, summarizes the results of an industry survey conducted by the SMS/800 Restructuring Research Committee, a group of industry representatives. The current BOC leadership of SMS/800, Inc. organized this Committee to ensure that all industry constituents are involved in and supportive of the proposed transitions concerning oversight of the SMS/800 system. As Exhibit B reflects, the Committee surveyed a broad cross-section of the industry and achieved a significant response rate. The survey results demonstrate the industry's support for the SMS/800 transition plan described in Exhibit A, including broad support for the details of that plan.

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One original and two copies of this letter and its attachments are being submitted to you in compliance with 47 C.F.R. § 1.1206(a)(2) to be included in the record of these proceedings. If you have any questions concerning this matter, please contact me at (202) 326-7921.

Sincerely,

Aaron M. Panner /MLB

Aaron M. Panner

Enclosures

cc: Ann Stevens
Jodie May
Michelle Sclater
Heather Hendrickson
Joel Rabinovitz

# Exhibit A

<u>**Transition Proposal for SMS/800 Access**</u>

As you are aware, the Bell Operating Companies ("BOCs") are seeking to transfer responsibility for the provision of 800 Service Management System ("SMS/800") access to SMS/800, Inc. In our ex parte meeting of April 5, 2011, we provided the Commission with a proposal for accomplishing this transfer. In response to questions raised by Commission staff during that meeting and our subsequent ex parte discussion of May 5, 2011, we have provided additional detail below concerning (1) any potential constraints on the procedural mechanism through which the transfer can be accomplished and (2) whether additional procedures are required because SMS/800 serves customers located outside the United States.

First, as explained more fully below, notice-and-comment rulemaking is not required to transfer SMS/800 tariffing responsibility. The Commission has never ruled that this responsibility cannot be transferred to another entity, and the initial assignment of responsibility to the BOCs occurred in a declaratory ruling, not a substantive rulemaking. Second, an international § 214 application is not required to complete the proposed transfer; that procedure applies only to transfers of authority over international lines, which SMS/800 system does not operate or use for transmission. For completeness, this white paper also sets out background information that was previously provided.

As described in its tariff, SMS/800 is "an operations and administrative support system used for the creation and maintenance of call processing records for toll-free telephone numbers." SMS/800 is used by Responsible Organizations ("Resp Orgs"), entities designated by toll-free service subscribers to manage their SMS/800 records. SMS/800 also populates the database systems known as Service Control Points ("SCPs"), which contain routing and other processing instructions for toll-free calls. SCP Owner/Operators are also SMS/800 customers.

The BOCs currently engage SMS/800, Inc., a nonprofit membership corporation consisting of one representative from each of the three BOCs, to operate the SMS/800 database. The BOCs are the sole members of SMS/800, Inc., and representatives of the BOCs serve as the only directors of SMS/800, Inc. SMS/800, Inc., in turn, has engaged third-party providers to facilitate operation of the database. One of these third-party providers, Database Services Management, Inc. ("DSMI"), handles the daily operation of SMS/800. *See* Fifth Report and Order in CC Docket No. 95-155, *Toll Free Service Access Codes*, 15 FCC Rcd 11939 (2000).

The BOCs and SMS/800, Inc., seek to transfer responsibility for the provision of SMS/800 access from the BOCs to SMS/800, Inc. Additionally, and in coordination with that proposed transfer, the BOCs are seeking to transfer responsibility for governance of SMS/800, Inc., to the SMS/800 user community (the "industry").

*A. Transfer of Tariff Responsibility*

The BOCs and SMS/800, Inc. seek to accomplish the transfer of tariffing responsibility by filing a joint transfer of control application under 47 U.S.C. § 214 and 47 C.F.R. § 63.03.

**1.** Under § 214, a telecommunications carrier must obtain a certificate of public convenience and necessity from the Commission before constructing, acquiring, operating, or engaging in transmission over lines of communications, or before discontinuing, reducing, or impairing service to a community. Under section 63.03 of the Commission's regulations, a domestic carrier seeking to transfer control of lines or authorization to operate pursuant to § 214 must obtain prior approval from the Commission. Accordingly, the BOCs and SMS/800, Inc. would apply to the Commission to transfer authorization to operate the SMS/800 access service.

The § 214 transfer process is an appropriate mechanism for accomplishing the proposed reorganization of SMS/800 because, as the Commission has determined, SMS/800 access is a

Title II common carrier service that must be offered under tariff. *See* Order, *Provision of Access for 800 Service*, 8 FCC Rcd 1423, 1426-27 (1993); *Beehive Telephone Inc. v. The Bell Operating Companies*, 12 FCC Rcd 17930, 17956 (1997); *see also* Bell Operating Companies' Tariff for 800 Service Management System (SMS/800) Functions, Tariff F.C.C. No. 1 ("SMS/800 Tariff"). Common carrier services include those that involve "interstate or foreign communication by wire or radio." 47 U.S.C. § 153(11). "Communication by wire," in turn, includes not only "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection," but also all facilities and services that are "incidental to such transmission." *Id.* § 153(59). The Commission has determined that although SMS/800 access does not itself involve interstate or foreign transmission, it is "technically necessary" for, and therefore "incidental to," the provision of an interstate and/or foreign transmission service — namely, 800 access service. *Provision of Access for 800 Service*, 8 FCC Rcd at 1426.

**2.** The Commission made this determination in response to a petition for declaratory ruling asking the Commission to require that SMS/800 access be tariffed. *See id.* at 1425. Having granted that petition, the Commission proceeded to address, on its own motion, who should file the tariff for SMS/800 access in the first instance. At the time, the BOCs and their subsidiary Bellcore controlled all aspects of the SMS/800 operation. "Under these circumstances," the Commission found, "the BOCs should file the SMS tariff." *Id.* at 1427. Subsequent to the Commission's ruling, the BOCs have filed the SMS/800 tariff since the establishment of SMS/800 in 1993. *See id.*; *Beehive*, 12 FCC Rcd at 17965.

The Commission's initial assignment of tariffing responsibility to the BOCs does not, however, preclude a transfer of that responsibility or make § 214 an inappropriate procedural vehicle for reassigning that responsibility to SMS/800, Inc. First, the Commission's 1993 order did not deny the BOCs ability to transfer the tariff-filing responsibility pursuant to otherwise applicable statutes and regulation, if such a transfer was shown to be in the public interest. Thus a transfer of tariff responsibility would not be inconsistent with the Commission's determination that the BOCs should file the tariff in the first instance.

Even if the proposed transfer represented a departure from the Commission's prior determination, there would be no obligation to conduct a notice-and-comment rulemaking to effect that change. Typically, a change in agency policy requires notice-and-comment rulemaking if the policy represents a "substantive rule" or (more controversially) if the agency is departing from a settled interpretation of its own regulation. *See, e.g.*, *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (defining "substantive rule" as one in which the agency "claim[s] to be exercising authority to itself make positive law"); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."). Neither description applies to the Commission's directive to the BOCs to file the SMS/800 tariff. In doing so, the Commission did not purport to set out a legal rule or interpret an existing regulation. Instead, much like a policy statement, the Commission's order "simply let[] the public know its current enforcement or adjudicatory approach." *Syncor*, 127 F.3d at 94. Therefore the Commission "retains the discretion and the authority to change its position." *Id.*

The procedural context of the Commission's decision confirms its freedom to reassign SMS/800 tariffing responsibility. The Commission's initial assignment of that responsibility to the BOCs was in response to a petition for declaratory ruling. A petition for declaratory ruling "terminating a controversy or removing uncertainty" is handled "in accordance with section 5(d) of the Administrative Procedure Act." 47 C.F.R. § 1.2(a). Section 5(d), now codified at 5 U.S.C. § 554(e), classifies such declaratory orders as a type of adjudication. *See also Chisholm v. FCC*, 538 F.2d 349, 364 n.30 (D.C. Cir. 1976) ("The declaratory ruling belongs to the genre of adjudicative rulings."). Thus the Commission's declaratory ruling proceedings are not subject to the notice and comment requirements set out in 5 U.S.C. § 553. Indeed, as a declaratory order, the Commission's initial assignment of SMS/800 tariffing responsibility to the BOCs is "even further removed from rulemaking requirements" than an "interpretative rule." *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 989 (D.C. Cir. 1978). Unlike "substantive" or "legislative" rules, "interpretative rules" can be changed without resort to notice-and-comment rulemaking procedures. *See, e.g., American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-09 (D.C. Cir. 1993) (discussing "[t]he distinction between those agency pronouncements subject to APA notice-and-comment requirements and those that are exempt"). So too can declaratory orders, such as the assignment of SMS/800 tariffing responsibility, be changed by the Commission without resort to rulemaking.

**3.** In an ex parte discussion on May 5, 2011, Commission staff raised the question whether the proposed transfer of SMS/800 access would require both a domestic and an international § 214 application. Under the Commission's rules, no international application is required, and the transfer of tariff responsibility can be effected through a single, domestic § 214 application.

An international § 214 application is required only when a party seeks to "construct a new line, or acquire or operate any line, or engage in transmission over or by means of such additional line" in order to provide service between the United States and a foreign point. 47 C.F.R. § 63.18. The SMS/800 database includes toll-free numbers assigned to customers throughout the geographic area served by the North American Numbering Plan. While subscribers to toll-free services may be located elsewhere in North America, the operation of SMS/800 service occurs entirely within the United States and is governed by a domestic tariff. It does not involve operation of or transmission over any international "lines." Accordingly, as the provider of SMS/800 access, SMS/800, Inc., would not acquire, own, or operate any international "lines." And, as described above, the Commission has determined that SMS/800 access is not itself a transmission service but is instead "incidental to" such service. *See Provision of Access for 800 Service*, 8 FCC Rcd at 1426; *see also* SMS/800 Tariff § 2.1.1(B) ("The Company does not undertake to transmit messages under this tariff, but furnishes the use of its services to Resp Orgs for the creation and maintenance of toll-free call processing records."). The contemplated transfer involves a domestic common carrier service but no international service subject to the requirements of § 214 and therefore requires only a domestic § 214 application.

**4.** Finally, the BOCs' proposed § 214 transfer application would be eligible for streamlined treatment. Section 63.03 provides for a streamlined transfer of control process with an expedited commenting schedule; under this process, applicants may transfer control on the 31st day after the date of public notice listing the application as a streamlined application. 47 C.F.R. § 63.03(a). This streamlined process presumptively applies to certain enumerated categories of applications, including those in which "[t]he transferee is not a telecommunications provider." *Id.* § 63.03(b)(ii). Because SMS/800, Inc., the proposed transferee, is not currently a provider of telecommunications services, the application to transfer control of SMS/800 access would be eligible for the streamlined process.

*B. Transfer of Governance*

As noted above, the planned transfer of tariffing responsibility to SMS/800, Inc., would coincide with a change in that company's governance. Specifically, SMS/800, Inc., would expand its governance from a structure where the BOCs are the sole members and BOC representatives the only directors, to a structure where other industry participants assume a governance role.

Prior to any transfer of tariffing authority under § 214, the current BOC leadership of SMS/800, Inc., would put in place a lean executive management team to oversee the day-to-day operations of the company and the SMS/800 system. This team would have responsibility for and authority over such tasks as provisioning of SMS/800 services, vendor contracts, customer service, interfacing with the SMS/800 Number Administration Committee ("SNAC"), and addressing regulatory issues. The management team would report to an expanded Board of Directors charged with strategic oversight of the company. The Board would include representatives from the industry as well as independent directors. The new Board members would be elected in coordination with the Commission's consideration of a § 214 transfer application but would not take office until the requested transfer had been completed.

This governance transition can be accomplished without additional Commission action. A transfer of control application is required only when there is a change of a carrier's "ultimate ownership or control." 47 C.F.R. § 63.03(d). As described above, control of SMS/800, Inc., is currently shared between the three BOCs; no single BOC exercises control. Thus a transfer of governance from the BOCs to other industry players so long as no single industry player assumes *de jure* or *de facto* control over SMS/800, Inc. would not constitute a transfer of control under section 63.03(d) of the Commission's rules and would not require a separate or additional transfer of control application.

# Exhibit B

# SMS/800, Inc., Restructuring Study

## Overview of Quantitative Survey Findings

SMS/800, Inc., Restructuring Study
Research Committee
May 2011

Taylor Research & Consulting

# Study background

- Study Objective:
  - To explore current SMS/800-user expectations for a potential restructuring of SMS/800, Inc., including a possible change in the composition of the (presently BOC-only) Board of Directors.
- Methodology:
  - Online interviews.
  - Sample provided by SMS/800, Inc.
  - Primary contacts.
  - 109 completed interviews.
  - 27% response rate (among 409 ROs and SCP O/Os).
  - Interviews conducted April 22 to May 1, 2011.
  - Sampling error = +/- 6.8 pps.

# Study background

## Restructuring Research Committee

| COMPANY | NAME |
|---|---|
| 800 Response Information Services LLC | Heather Welch |
| Advanced Communications Integration, Inc. | Robert Leabow |
| ATL Communications | Aelea Christofferson |
| Grande Communication Networks, LLC. | Dale Schneberger |
| Level 3 Communications, LLC | Monica O'Neill |
| SMS/800 Management Team | Peter Bahr |
| The Taylor Research & Consulting Group, Inc. | Jason LaMountain |
| Windstream Nuvox | Thomas Houlihan |
| Worldlink Services Corp | Adam Long |

# Study background

**RO Respondent Profile**

| 104 ROs represent 26% of the whole RO community | |
|---|---|
| Range of TFNs managed | 10-5,800,545 |
| Mean number of TFNs managed | 175,290 |
| Median number of TFNs managed | 5,987 |
| Manage 1 to <10,000 TFNs | 58.7% (N=61) |
| Manage 10,000 to < 25,000 TFNs | 12.5% (N=13) |
| Manage 25,000 to <50,00 TFNs | 8.6% (N=9) |
| Manage 50,000 to <100,000 TFNs | 5.8% (N=6) |
| Manage 100,000 to <250,000 TFNs | 5.7% (N=6) |
| Manage 250,000 to <500,000 TFNs | 2.0% (N=2) |
| Manage 500,000+ TFNs | 6.7% (N=7) |

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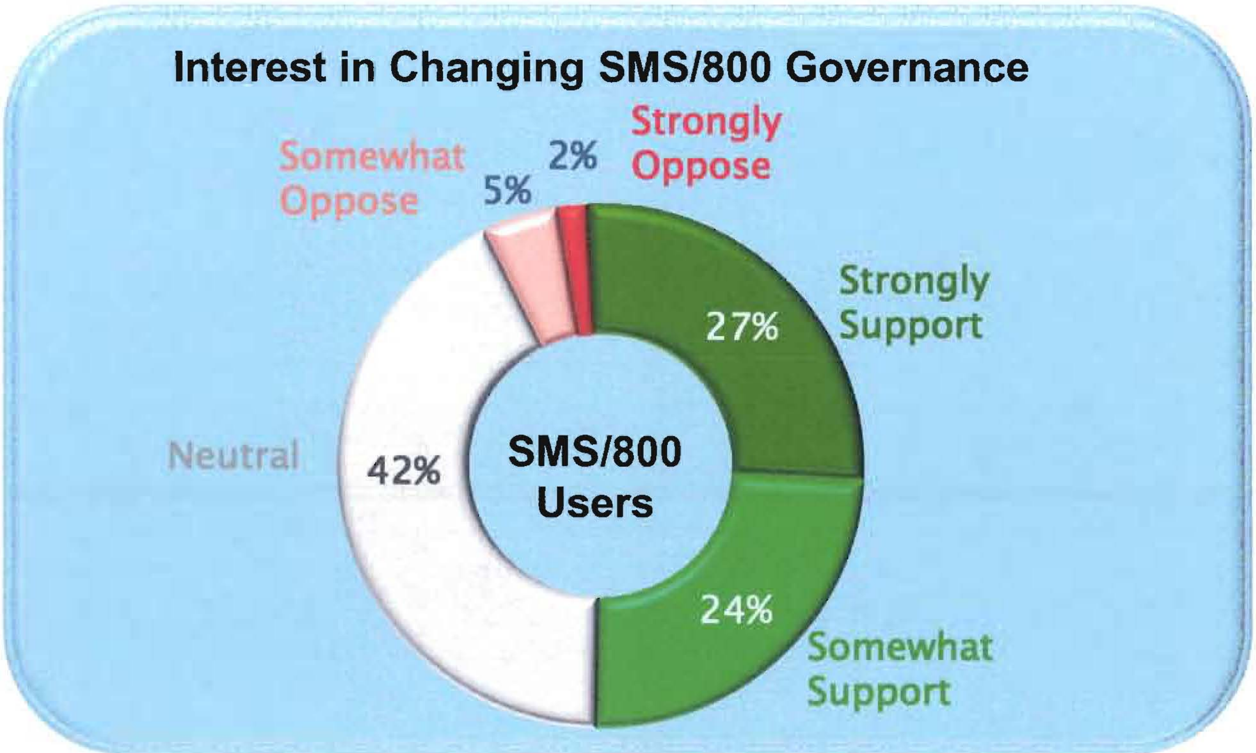
# Basis for change

- 51% favor a change in governance.
- 27% *strongly support* change.
- Large numbers neither support nor oppose.

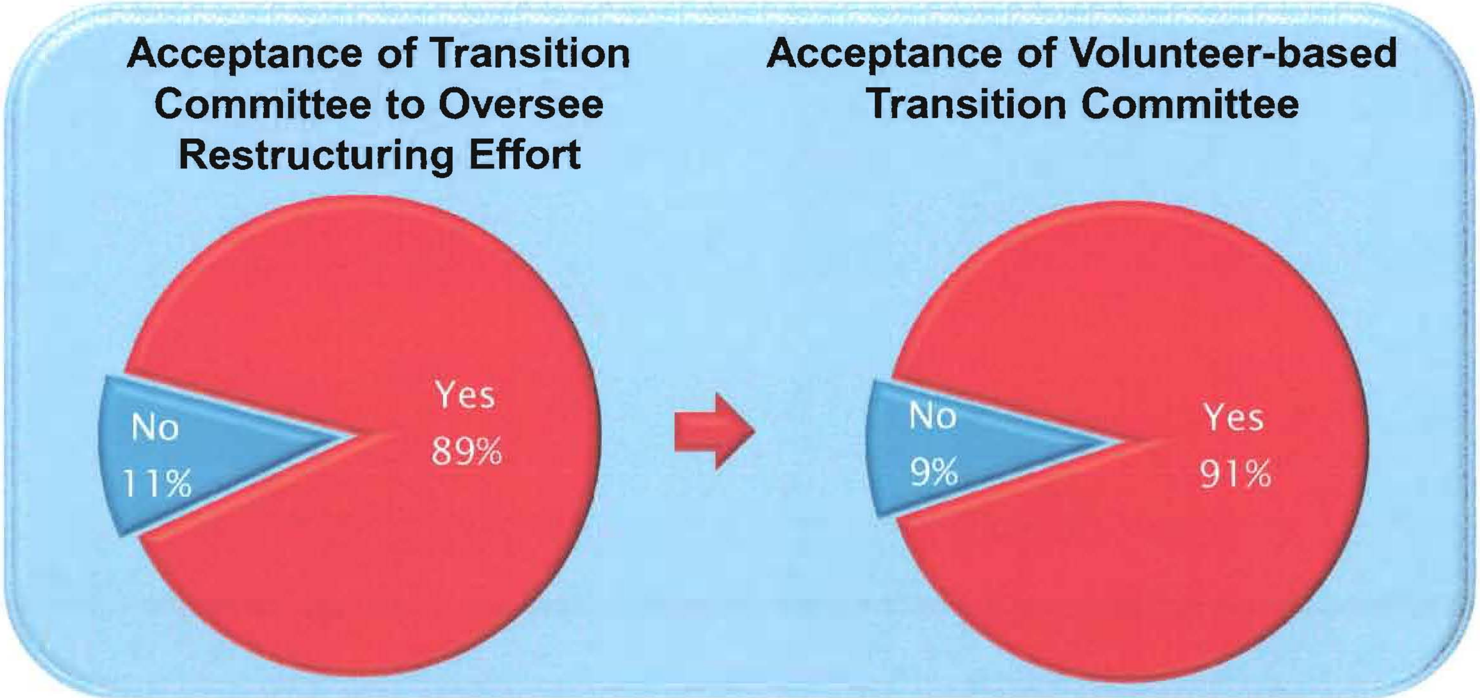



Q24. To what degree do you support a change in governance for SMS/800? **Base: All respondents N=109**

Taylor Research & Consulting

# Managing the transition to new governance

- **Transition Committee:** *Solid* majorities favor use of a transition committee of industry volunteers to plan and oversee the change in governance.




Q25. Would you be open to having a "transition committee" of 10-12 members of the SMS/800-user community oversee the distillation of the results of this research and the development of a comprehensive proposal for restructuring the *existing* SMS/800, Inc., and the future management of SMS/800? **Base: All respondents N=109** Q26. Would it be acceptable to you if this "transition committee" were assembled by some independent third party asking for volunteers to serve on this committee and then selecting some set number (e.g., 10-12 people) to serve? **Base: Open to having transition committee development of a transition plan N=97**

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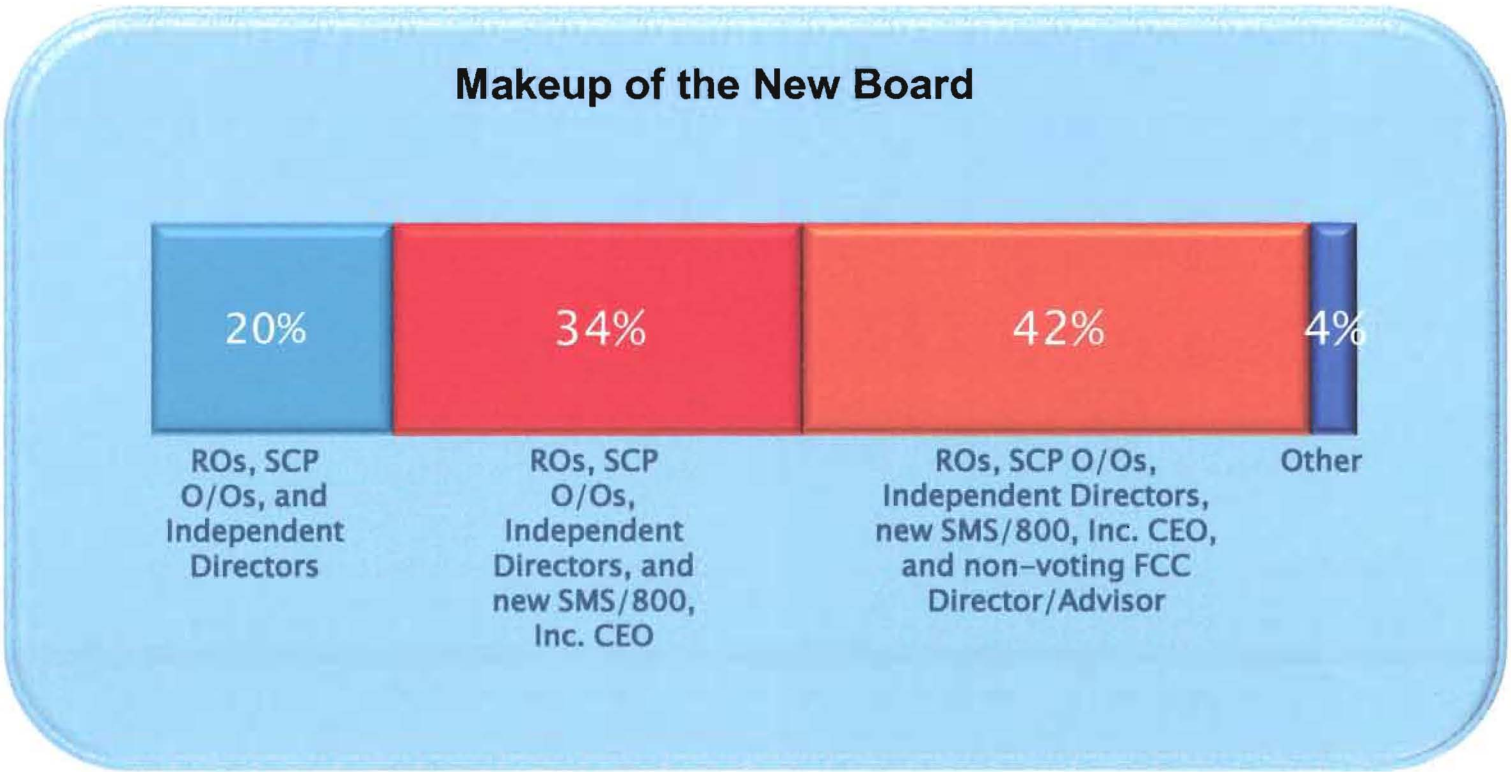
# Board composition

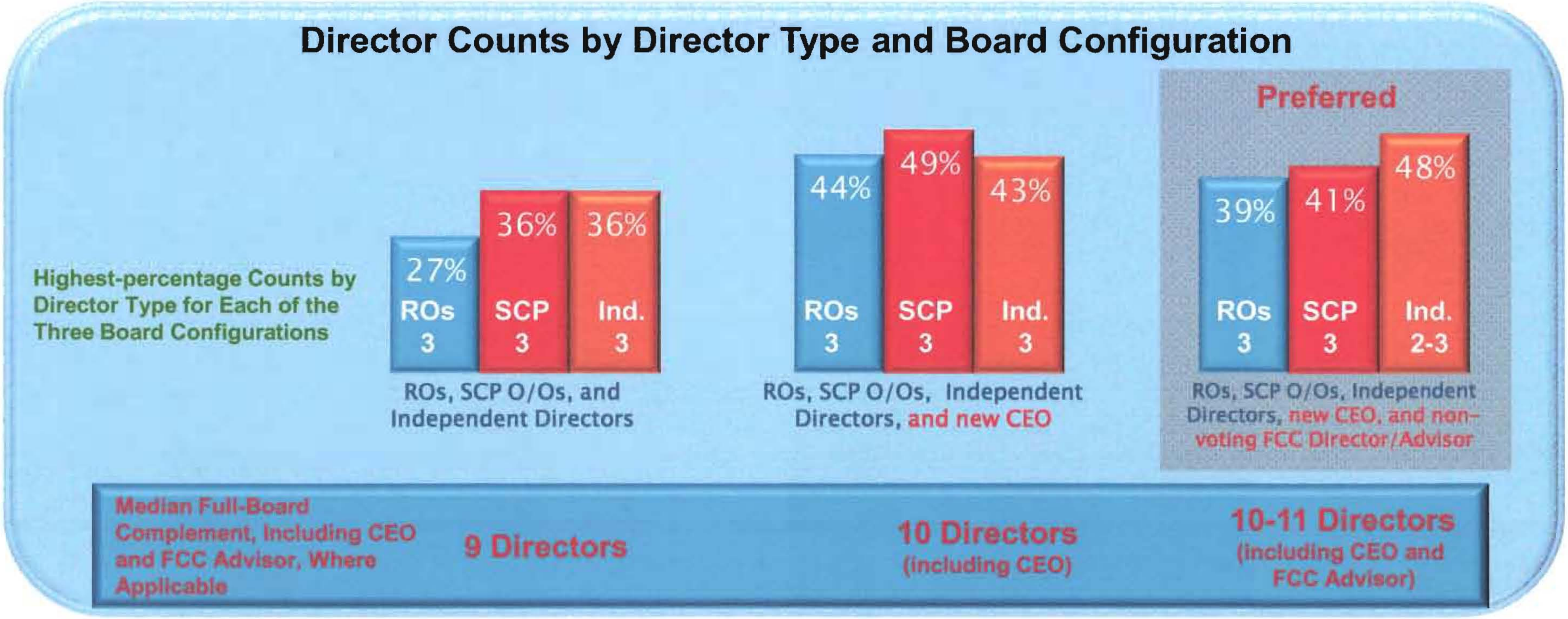
- Users clearly favor having a *diversified* Board.




Q4. What should the composition of the *new* SMS/800, Inc., Board of Directors be? **Base: All respondents N=109**

# Board composition

- **Composition:** Prefer a Board composed of ROs and SCP O/Os, independents, new CEO, and non-voting FCC Director/Advisor.
- **Size:** 10-11 Directors.




Q6a. What should be the proportions of ROs, SCP O/Os, and Independent Directors on the *new* SMS/800, Inc., Board of Directors? **Base: Favor Board Consisting of ROs, SCP O/Os, and Independent Directors N=22**** Q6b. In addition to the SMS/800, Inc. CEO, what should be the proportions of ROs, SCP O/Os, and Independent Directors on the *new* SMS/800, Inc., Board of Directors? **Base: Favor Board Consisting of ROs, SCP O/Os, Independent Directors, and new SMS/800, Inc. CEO N=37**** Q6c. In addition to the SMS/800, Inc. CEO and an independent, non-voting Director or Advisor from the FCC, what should be the proportions of ROs, SCP O/Os, and Independent Directors on the *new* SMS/800, Inc., Board of Directors? **Base: Favor Board Consisting of ROs, SCP O/Os, Independent Directors, new SMS/800, Inc. CEO, and FCC Director/Advisor N=46***

****Caution: small base.*** ***** Caution: very small base.***

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